

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERRY J. DICK,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of social
Security,

Defendant.

NO. CV-04-349-MWL

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on June 6, 2005. (Ct. Rec. 10, 12.) Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 12) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 10).

Plaintiff filed an application for disability income benefits ("DIB") on February 6, 1999. (Tr. 149.) His claim was denied. After a hearing, Administrative Law Judge (hereinafter, "ALJ,") Mary B. Reed denied benefits in a decision issued on January 25, 2001. (Tr.

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1 25.) The Appeals Council denied review. The instant matter is
2 before this court pursuant to 42 U.S.C. § 405(g).

3 **ADMINISTRATIVE DECISION**

4 The ALJ found that plaintiff had not engaged in substantial
5 gainful activity after his alleged onset date of October 1, 1996.
6 (Tr. 25.) The ALJ found that though plaintiff suffers from a past
7 gunshot wound to his left hand with the residual functional loss
8 of three fingers, chronic lumbosacral pain without evidence of
9 arthritis or degenerative disc disease, mild degenerative
10 arthritis of the cervical spine, post-traumatic stress disorder
11 ("PTSD"), somatoform disorder, and alcohol abuse in reported
12 remission, impairments that are severe, his impairments do not
13 meet or medically equal the Listings. (Tr. 19-20.) The ALJ found
14 that plaintiff retains the residual functional capacity for medium
15 work with specified limitations. (Tr. 24.) Relying on the
16 testimony of a vocational expert, the ALJ found that plaintiff
17 could perform his past relevant work as a surveyor. (Tr. 24-25.)
18 The ALJ found that Plaintiff was not disabled before his insured
19 status expired on March 31, 1997. (Tr. 26.)

20 **STANDARD OF REVIEW**

21 The standard for review by this Court is set forth in *Edlund*
22 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

23 A district court's order upholding the
24 Commissioner's denial of benefits is reviewed de novo.
25 *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).
26 The decision of the Commissioner may be reversed only if
27 it is not supported by substantial evidence or if it is
28 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
1097 (9th Cir. 1999). Substantial evidence is defined as
being more than a mere scintilla, but less than a
preponderance. *Id.* at 1098. Put another way, substantial
evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion.
 2 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 3 evidence is susceptible to more than one rational
 4 interpretation, the court may not substitute its
 judgment for that of the Commissioner. *Tackett*, 180 F.3d
 at 1097; *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th
 Cir. 1999).

5 The ALJ is responsible for determining credibility,
 6 resolving conflicts in medical testimony, and resolving
 7 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 8 Cir. 1995). The ALJ's determinations of law are
 reviewed *de novo*, although deference is owed to a
 reasonable construction of the applicable statutes.
McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000).

9 SEQUENTIAL PROCESS

10 Under the Social Security Act, individuals who are
 11 "under a disability" are eligible to receive benefits.
 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as
 12 "any medically determinable physical or mental
 13 impairment" which prevents one from engaging "in any
 14 substantial gainful activity" and is expected to result
 in death or last "for a continuous period of not less
 15 than 12 months." 42 U.S.C. § 423(d)(1)(A),
 1382c(a)(3)(A). Such an impairment must result from
 16 "anatomical, physiological, or psychological
 17 abnormalities which are demonstrable by medically
 18 acceptable clinical and laboratory diagnostic
 19 techniques." 42 U.S.C. § 423(d)(3). The Act also
 20 provides that a claimant will be eligible for benefits
 only if his impairments "are of such severity that he is
 not only unable to do his previous work but cannot,
 considering his age, education and work experience,
 engage in any other kind of substantial gainful work
 which exists in the national economy...." 42 U.S.C. §
 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of
 disability consists of both medical and vocational
 components.

21 The Commissioner has established a five-step
 22 sequential evaluation process for determining whether a
 person is disabled. 20 C.F.R. §§ 404.1520, 416.920;
Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

23 Step 1: Is the claimant engaged in substantial gainful
 24 activities? 20 C.F.R. 404.1520(a)(4)(i), 416.920(a)(4)(i).
 If so, benefits are denied. If not, the decision maker
 proceeds to step two.

25 Step 2: Does the claimant have a medically severe
 26 impairment or combination of impairments? 20 C.F.R.
 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does
 27 not have a severe impairment or combination of impairments,
 the disability claim is denied. If the impairment is severe,
 the evaluation proceeds to step three.

Step 5: Is the claimant able to perform other work in the national economy considering age, education, work experience and residual functional capacity? 20 C.F.R. 404.1520(a)(4)(v), 416.920(a)(4)(v).

17 || ISSUES

24 ADMINISTRATIVE HEARING

- 4

1 nightmares. (Tr. 88.) Plaintiff can climb stairs but gets
2 "winded." (Id.) He can lift 15 to 20 pounds, sit for 60 to 90
3 minutes before changing positions, and stand for 30 minutes. (Tr.
4 85-86.) Plaintiff is able to walk ½ mile and can drive. His
5 activities include fishing and hunting deer. (Tr. 86-87; 98; 102-
6 03.) He hunted deer in 1997, 1998 and 1999, and tries to do all of
7 his hunting alone. (Tr. 103-06.) Plaintiff fishes about once a
8 week for 2 to 3 hours a time. (Tr. 103.) He cuts wood, up to 3
9 cords with a chainsaw. (Tr. 106.) Plaintiff testified that he last
10 drank 2-3 years ago, but when asked if he had abstained from
11 alcohol for the past couple of years, he responded, "No, I
12 couldn't honestly say that." (Tr. 91.)

13 ANALYSIS

14 Evaluating medical opinions

15 Plaintiff alleges that the ALJ erred by failing to properly
16 credit the opinions of examining physicians Helen Pamintuan, M.D.,
17 and Dennis R. Pollack, Ph.D. (Ct. Rec. 11 at 12-15.) He argues that
18 the ALJ erred by giving greater weight to the opinion of consulting
19 physician Allen Bostwick, Ph.D. The Commissioner responds that the
20 ALJ rejected portions of the examining doctors' opinions for
21 specific and legitimate reasons supported by substantial evidence.
22 (Ct. Rec. 13 at 7.)

23 The opinion of an examining physician may be rejected for
24 "specific, legitimate reasons" that are supported by substantial
25 evidence in the record. *See Andrews v. Shalala*, 53 F. 3d 1035, 1043
26 (9th Cir. 1995). The opinion of a non-examining physician cannot by
27 itself constitute substantial evidence that justifies the rejection
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1 of either an examining or a treating physician's opinion. *Lester v.*
2 *Chater*, 81 F. 3d 821, 831 (9th Cir. 1995), citing *Pitzer v. Sullivan*,
3 908 F. 2d 502, 506 n. 4 (9th Cir. 1990). The opinion of a non-
4 examining physician may constitute substantial evidence if it is
5 supported by and consistent with other evidence. *Andrews*, 53 F. 3d
6 at 1043; *Lester*, 81 F. 3d at 830-31. The ALJ is responsible for
7 determining credibility, resolving conflicts in medical testimony,
8 and resolving ambiguities. *Edlund v. Massanari*, 253 F. 3d 1151,
9 1156 (9th Cir. 2001).

10 On March 3, 1997, Helen Pamintuan, M.D., examined plaintiff
11 when he sought to increase his VA disability rating from 40%. (Tr.
12 387.) The 40% disability rating was based on a gunshot wound
13 plaintiff suffered in 1968 resulting in the loss of three fingers
14 from his left hand. (Tr. 387.) Dr. Pamintuan indicates that she
15 relied on information provided by the plaintiff, the clinical chart,
16 and the C-file in performing her evaluation. (Id.)

17 Plaintiff told Dr. Pamintuan that he quit drinking about two
18 years earlier. (Tr. 388.) At the time of the evaluation plaintiff
19 took darvocet for low back pain following a car accident in January
20 of 1997 and an antidepressant, zoloft. Plaintiff said that he saw a
21 mental health counselor in 1970 pursuant to a court order but only
22 attended for two months. No medications were prescribed. (Id.) He
23 went to Veterans Outreach in 1995 for symptoms (apparently of PTSD)
24 and said that since then he had attended Veterans Outreach at least
25 twice monthly. (Id.)

26 Plaintiff reported that he had been working in forestry
27 development service "about three to four months in a year until the
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1 present time" (March of 1997). (Tr. 389.) He had nightmares twice
2 monthly and averaged three hours of sleep nightly. He often
3 experienced abdominal pain and his back hurt all the time. Plaintiff
4 enjoyed fishing and hiked a lot by himself. (Id.)

5 Dr. Pamintuan administered several tests. (Tr. 390.) She
6 diagnosed PTSD, delayed, chronic; chronic lumbar back pain, and
7 moderate psychosocial and environmental problems secondary to
8 occupational and economic problems. (Tr. 392.) She assessed a past
9 GAF of 55, and a current of 60. (Id.) A GAF of 60 indicates moderate
10 symptoms or moderate difficulty in social, occupational, or school
11 functioning. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS,
12 FOURTH EDITION (DSM-IV), at 32 (1995).

13 The ALJ notes that, despite his diagnosis of PTSD, plaintiff
14 was able to work:

15 "The VA examiner [Dr. Pamintuan] reported a diagnosis of
16 PTSD, but no clinical findings or functional limitations
17 were specified that are inconsistent with the assessment
18 of mental residual functional capacity delineated in this
19 decision. (Exhibit 9F.) The record reflects that even
20 though the claimant was diagnosed with PTSD he was able to
21 continue with work related activities."

22 (Tr. 23.)

23 The record reveals that plaintiff was able to work, both after
24 his first diagnosis of PTSD in 1995, and before and after Dr.
25 Pamintuan's diagnosis in March of 1997. The ALJ observes that the
26 "record fails to establish that he was precluded from the
27 performance of his past relevant work for any continuous 12 month
28 period relevant to this adjudication. " (Tr. 20.) As noted, the
relevant period is October 1, 1996 through March 31, 1997. The ALJ
states:

1 "With respect to the claimant's mental impairments, . . . He
2 evidently attended three individual sessions but **"has seasonal**
3 **employment** which is detrimental to coming to [sic] Vet Center
4 in summer." Exhibit 7F at 6. (It is noted that on **July 17,**
5 **1996, the claimant entered into a contract** with the
6 Confederated Tribes of the Colville Reservation **to mark trees**
7 for the sum of \$2,965.00. Exhibit 11E. Moreover, on **August 13,**
8 **1996, the claimant** under the business name of Klondike Logging
9 and Reforestation **entered into another contract to mark trees**
10 for the sum of \$6,940.00). On **July 24, 1996, the claimant**
11 reported nightmares, depression, sleep problems, anger and
intrusive thoughts. . . He also **reported being self-employed**
12 **as a contractor.** Exhibit 7F at 21 [Tr. 286 dated 7/24/96.] .
13 . . . The claimant did not seek counseling until September
14 1996. Exhibit 7F 8-9. In **October 1996 he reported being 'very**
15 **busy with his work and getting ready for work [sic] winter.'**
16 Exhibit 7F at 9. In **October he reported being 'busy working at**
17 **Forestry development, planting and cutting down trees.'** His
18 affect was appropriate and mood less depressed, with nightmares
19 decreased. He reported anger problems, but he dealt with it by
20 going for long walks in the mountains."

21 (Tr. 20-21.) (emphasis added.) The ALJ notes that plaintiff told Dr.
22 Pamintuan that in the last five years (from 1992 until March of
23 1997) he worked 3-4 months a year in the forestry development
24 service -- well after the alleged onset date of October 1, 1996.
25 (Tr. 21; Tr. 389.) Although the income derived from plaintiff's
26 forestry work does not amount to substantial gainful activity, his
27 work record shows, as the ALJ observes, that there is no 12 month
28 continuous period of disability within the relevant time frame. (Tr.
19-20.)

1 The ALJ relied on plaintiff's vocational training efforts when
2 she assessed Dr. Pamintuan's opinion. In February of 1997, a month
3 before the evaluation, plaintiff told the VA that he was leaving for
4 three months of vocational training in Nevada. (Tr. 21, relying on
5 Tr. 280.) At the hearing plaintiff testified that he was training to
6 repair slot machines. He started the program but did not finish due
7 to family and financial problems. (Tr. 102.) As the ALJ noted,

1 plaintiff began this three month vocational training program four
2 months after the alleged onset date. (Tr. 21; 23-24).

3 When a claimant can spend a substantial part of his day engaged
4 in the performance of physical activity which is transferable to a
5 work setting, such a finding is sufficient to discredit allegations
6 of disability. See *Fair v. Bowen*, 885 F. 2d 597, 603 (9th Cir. 1989).

7 The opinion of the testifying medical expert, Allen Bostwick,
8 Ph.D., supports assessing mostly mild rather than moderate
9 limitations. (Tr. 59-62.) Dr. Bostwick opined that in two areas
10 plaintiff's limitations could potentially rise to moderate: the
11 ability to act within a schedule (based on the number of plaintiff's
12 missed medical appointments), and the ability to work in proximity
13 to others without being distracted. (Tr. 59-60.) If working with the
14 general public or a large number of co-workers, then this could rise
15 to a moderate limitation depending on the degree of social
16 interaction. (Tr. 60-61.) Dr. Bostwick indicated that a moderate
17 limitation might arise if a supervisor spoke to plaintiff in a
18 belittling or condescending manner. (Tr. 62.) Dr. Bostwick assessed
19 moderate limitations in the ability to interact appropriately with
20 the general public. (Tr. 61.)

21 The ALJ considered plaintiff's credibility because Dr.
22 Pamintuan based her assessment in part on his self-reported
23 symptoms. (Tr. 23.) The ALJ found plaintiff less than completely
24 credible for several reasons.

25 Plaintiff failed to disclose his self-employment after the
26 alleged onset date to the SSA, except that he did disclose a brief
27 work attempt as a logger in April of 1997. (Tr. 19.) The record
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1 contains several references to plaintiff as a self-employed logger
2 in 1999 and 2000. (Id.) The ALJ notes that this failure to disclose
3 his self-employment is relevant to the issue of credibility. (Id.)

4 Plaintiff's reports of alcohol use have been inconsistent. In
5 October of 1996 he reported that he had been sober since July of
6 1996. (Tr. 21, Tr. 272.) In March of 1997 plaintiff reported that he
7 quit drinking in 1995. (Tr. 388.) Medical records show that on July
8 13, 1997, plaintiff had alcohol on his breath when admitted to the
9 hospital. (Tr. 533.) On April 18, 1999, plaintiff said that he had
10 been drinking at a wedding. (Tr. 581.) In March of 2000 plaintiff
11 said that he had not consumed alcohol in six or seven years. (Tr.
12 411.) The ALJ found plaintiff less than completely credible based on
13 his own inconsistent statements.

14 The ALJ gave Dr. Pamintuan's evaluation limited weight because
15 it was based partly on plaintiff's unreliable report. An opinion of
16 disability premised to a large extent upon the claimant's own
17 accounts of his symptoms and limitations may be disregarded, once
18 those complaints themselves have been properly discounted. *Flaten v.*
19 *Secretary of Health and Human Services*, 44 F. 3d 1453, 1463-64 (9th
20 Cir. 1995). Substantial evidence supports the ALJ's specific and
21 legitimate reasons for failing to fully credit Dr. Pamintuan's
22 assessed limitations.

23 Plaintiff alleges that the ALJ failed to properly credit the
24 March 9, 2000, opinion of examining physician Dennis Pollack, Ph.D.
25 (Ct. Rec. 11 at 12.) The Commissioner responds that the ALJ properly
26 discounted Dr. Pollack's opinions because they were based on
27 plaintiff's less than credible statements, and because the evidence
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1 did not establish that the March of 2000 opinion was probative of
2 plaintiff's impairments during the relevant time frame. (Ct. Rec. 13
3 at 9-11.)

4 Dr. Pollack administered tests, including the MMPI. He opined
5 that plaintiff's scores show that he may have been exaggerating his
6 difficulties as his F-scale score was elevated. (Tr. 413.) Dr.
7 Pollack added that "secondary gain is usually found with this
8 profile." (Tr. 413.) He diagnosed PTSD, alcohol dependency, in
9 remission, and somatoform disorder, NOS. (Id.) Dr. Pollack assessed
10 marked limitations in the ability to perform activities within a
11 schedule, maintain regular attendance, and be punctual within
12 customary tolerances, and in the ability to complete a normal
13 workday and workweek without interruptions from psychologically
14 based symptoms and to perform at a consistent pace without an
15 unreasonable number and length of rest periods. (Tr. 414-15.)

16 Dr. Bostwick reviewed Dr. Pollack's assessment. (Tr. 64.) He
17 notes that plaintiff told Dr. Pollack he broke bones in his neck
18 when a tree hit him, but the medical chart shows no evidence of an
19 orthopedic injury. The injury was diagnosed as a sprain. (Tr. 65.)
20 He notes that plaintiff told Dr. Pollack he had not worked since
21 1994. Yet, as Dr. Bostwick points out, in July of 1996 plaintiff
22 told the VA that he worked logging, in February of 1997 he said he
23 worked 3-4 months a year in forestry development service, and in
24 November of 1998 he hurt his right hand while cutting wood. (Tr.
25 65.) Dr. Bostwick observes that plaintiff told Dr. Pollack he had
26 heart attacks in 1992 and in 1998; however, the records do not
27 support this claim. (Tr. 66.)

1 Dr. Bostwick agrees with Dr. Pollack that plaintiff's tests
2 gave a valid profile, and that exaggeration of symptoms for
3 secondary gain is present. Dr. Bostwick stated that both the
4 hypochondriasis and psychopathic deviate scales indicate secondary
5 gain. (Tr. 67-68.) Dr. Bostwick noted that plaintiff had no regular
6 psychiatric treatment, which the ALJ found was inconsistent with Dr.
7 Pollack's assessed "marked" limitations. (Tr. 22-23.) In September
8 of 1996, Plaintiff was prescribed zoloft, but thereafter the records
9 show little to no reference to antidepressants or other psychotropic
10 drugs. (Tr. 68.)

11 The ALJ agreed with Dr. Bostwick that plaintiff's statements to
12 Dr. Pollack were unreliable and thereby diminished the quality of
13 Dr. Pollack's assessment. (Tr. 23.) The ALJ found that Dr. Pollack's
14 March 2000 assessment did not contain any retroactive clinical
15 findings which would support finding that marked limitations existed
16 during the relevant time frame roughly three years earlier. (Id.)
17 The ALJ relied on Dr. Pollack's testing which revealed that
18 plaintiff was motivated by secondary gain to exaggerate his
19 symptoms. (Tr. 24.)

20 An opinion based on the self-reporting of an unreliable person,
21 evidence of exaggerating symptoms, and daily activities that are
22 inconsistent with assessed impairments are all specific and
23 legitimate reasons to reject an examining physician's opinion. See
24 *Flaten v. Secretary of Health & Human Services*, 44 F. 3d at 1463-64;
25 *Andrews v. Shalala*, 53 F. 3d 1035, 1042-43 (9th Cir. 1995). The ALJ
26 gave specific and legitimate reasons supported by substantial
27 evidence in the record for discounting the marked impairments
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1 assessed by Dr. Pollack. Accordingly, the ALJ's determination must
2 be affirmed.

3 In her hypothetical to the vocational expert, the ALJ included
4 the "ability to interact appropriately with the general public is
5 moderately limited." (Tr. 112.) The ALJ included as a conditional
6 moderate limitation the "ability to complete a normal workday and
7 workweek without interruption from psychologically based symptoms
8 and to perform at a consistent pace without an unreasonable number
9 and length of rest periods if working around the general public or
10 groups of people." (Tr. 112.) Considering these moderate
11 limitations, the VE opined that plaintiff could perform his past
12 relevant work as a surveyor. (Tr. 113.)

13 The ALJ did not rely exclusively on the medical expert's
14 opinion in assessing plaintiff's limitations. The ALJ relied on the
15 evidence of plaintiff's continuous work history as a specific and
16 legitimate reason to assess primarily mild rather than moderate
17 limitations. (Tr. 23.)

18 Substantial evidence in the record supports the weight that the
19 ALJ gave to the medical opinions of examining physicians Pamintuan
20 and Pollack. As the ALJ observed, plaintiff's statements to medical
21 providers, his daily activities, his profile showing exaggeration of
22 symptoms and secondary gain issues, and the medical evidence as a
23 whole are all inconsistent with the level of impairment claimed at
24 the hearing and arguably assessed by Drs. Pamintuan and Pollack.
25 (Tr. 22-24.) The record supports the ALJ's determination.

26 CONCLUSION

27 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 10) is
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1 **DENIED.**

2 2. Defendant's Motion for Summary Judgment (Ct. Rec. 12) is

3 **GRANTED.**

4 3. Any application for attorney fees may be filed by separate
5 Motion.

6 4. The District Court Executive is directed to file this
7 Order and provide a copy to counsel for Plaintiff and Defendant.
8 Judgment shall be entered for Defendant and the file **CLOSED.**

9 **DATED** this 15th day of July, 2005.

10
11 s/ Michael W. Leavitt

12 MICHAEL W. LEAVITT
13 UNITED STATES MAGISTRATE JUDGE
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